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No. 78-619

In the Supreme Court of the United States

OCTOBER TERM, 1978

GETTY OIL COMPANY, PETITIONER

v.

DEPARTMENT OF ENERGY AND JAMES R. SCHLESINGER, SECRETARY OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 1-a to 14-a) is reported at 581 F. 2d 838. The opinion of the district court (Pet. App. 15-a to 26-a) is reported at 448 F. Supp. 16.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 18, 1978. A petition for rehearing was denied on September 11, 1978 (Pet. App. 42-a). The petition for a writ of certiorari was filed on October 11, 1978. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, as incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1).

QUESTION PRESENTED

Whether petitioner's solvents were subject to the Federal Energy Administration's price regulations between April 4, 1974, and January 16, 1975.

STATEMENT

Section 4(a) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 753(a), provides in pertinent part:

> the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation.

Pursuant to Section 4(a), on January 15, 1974, the FEA published mandatory petroleum price regulations that defined the term "covered product" as "a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321, or 2911." 39 Fed. Reg. 1950.[1] This definition included solvents, which are covered by Industry Code 2911. See R. A000204 para. 28 and A000335.[2] On February 4, 1974, the FEA amended this definition to exclude certain products:

[1]Regulations under the EPAA were first promulgated in January 1974 (see 39 Fed. Reg. 744, 1931) by the Federal Energy Office, to which the President had delegated his authority under the EPAA and portions of his authority under the Economic Stabilization Act of 1970. See Executive Order No. 11748, 38 Fed. Reg. 33575 (1973). The Federal Energy Administration was created on June 27, 1974, and assumed the responsibilities of the Federal Energy Office. Executive Order No. 11790, 39 Fed. Reg. 23185 (1974). We use the designation "FEA" to refer to both the Federal Energy Office and the Federal Energy Administration.

[2]"R." refers to the record filed in the Temporary Emergency Court of Appeals.

> "Covered products" means all products described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321 (except ethane) or 2911 (including benzene and toluene, but excluding ortho-xylene, meta-xylene, para-xylene and butadienes), and all forms of benzene and toluene.

39 Fed. Reg. 4467. The amended definition likewise encompassed solvents.

On April 5, 1974, the FEA amended this regulation a third time, defining "covered products" as "crude oil, residual fuel oil and refined petroleum products." 39 Fed. Reg. 12354. The amended regulation then defined the term "refined petroleum product" to mean "gasoline, kerosene, middle distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel." *Ibid.*

Petitioner interpreted this amendment as exempting its solvents from the pricing regulations, and, accordingly, from May 1, 1974, until the regulation was again amended on January 16, 1975, petitioner did not price its solvents as "covered products" (Pet. App. 17-a).[3] The FEA, however, concluded that petitioner's failure to price its solvents as "covered products" violated FEA's pricing regulations, and it issued a remedial order requiring petitioner to refund the amount petitioner had overcharged its customers between May 1, 1974, and January 14, 1975 (Pet. App. 17-a to 18-a).

Petitioner then instituted this action, seeking review of the FEA's remedial order and a declaratory judgment that FEA's regulation of the pricing and allocation of solvents was illegal and in excess of the agency's authority.

[3]The amended definition published on January 16, 1975, specifically included "solvents" within the definition of the term "covered products." 40 Fed. Reg. 2796.

The district court granted summary judgment for the FEA (Pet. App. 15-a to 26-a). The court concluded that petitioner's solvents are "distillates" within the meaning of the EPAA and therefore are subject to mandatory allocation and price regulation under 15 U.S.C. 753.[4] The court noted that the FEA had originally included solvents in its allocation and pricing regulations, and it rejected petitioner's contention that the April 5, 1974, amendment of FEA's regulations had exempted solvents from regulation (Pet. App. 23-a to 24-a). Indeed, given the statutory provision requiring the allocation of solvents, the court stated that any attempt to amend the regulations to exclude solvents would have been invalid (*id.* at 25-a to 26-a). Accordingly, the court concluded that petitioner had erred in treating its solvents as free of the EPAA price restrictions between May 1, 1974, and January 14, 1975 (*id.* at 26-a).

A divided panel of the Temporary Emergency Court of Appeals affirmed (Pet. App. 1-a to 14-a). The court agreed that the EPAA imposes a duty on the FEA to regulate the pricing and allocation of petitioner's solvents, which it found to be "distillates" within the meaning of 15 U.S.C. 752(5). It rejected petitioner's "hypertechnical argument that the pricing and allocation of the solvents in issue were somehow exempted from the mandatory coverage of the EPAA" as "unconvincing and unsupported in the plain language of the EPAA" (Pet. App. 6-a). It also rejected petitioner's contention that between May 1, 1974, and January 15, 1975, solvents were exempted from the definition of "covered products," concluding that petitioner's argument was based on "an obvious minor defect in drafting a subordinate definition of 'middle distillates'" in the amendments to the regulations governing pricing (Pet. App. 6-a to 7-a).

[4]15 U.S.C. 752(5) defines the term "refined petroleum product" in 15 U.S.C. 753(a) to include "distillates."

The court further concluded that "the allocation of the solvents in issue was clearly covered by the contemporaneous regulations of the FEA" (*id.* at 7-a to 8-a). It held (*id.* at 8-a) that given the provision requiring the FEA to regulate the price and allocation of solvents, "the existence of the allocation regulation was adequate and fair notice to [petitioner] that the solvents in issue were covered products," and as such their price was regulated by the general pricing regulations, 10 C.F.R. 212.83. Finally, the court rejected petitioner's argument (*id.* at 9-a) that the EPAA and regulations, so construed, were void for vagueness.

ARGUMENT

1. Petitioner contends (Pet. 17-19) that the FEA's regulations did not provide notice that the price of solvents was regulated and accordingly that the application of FEA's pricing standards to petitioner's past solvent sales violates the Due Process Clause.

The Temporary Emergency Court of Appeals correctly rejected this contention (Pet. App. 8-a to 9-a), finding that petitioner had "adequate and fair notice" that its solvents were subject to the FEA's price regulations. The court pointed out that Section 4(a) of the EPAA directed the FEA to regulate the price of solvents—which are petroleum "distillates" and thus "refined petroleum products" under 15 U.S.C. 752(5) and 753(a) (Pet. App. 6-a to 7-a). FEA's initial pricing regulations clearly included solvents (*id.* at 7-a), and solvents had not been decontrolled pursuant to the procedures established by Section 12 of the EPAA, 15 U.S.C. 760a, which requires Presidential action (Pet. App. 7-a).[5] The court noted (*id.* at 8-a) that the allocation of solvents was clearly

[5]Solvents were subsequently decontrolled pursuant to the statutory procedures, effective September 1, 1976. 41 Fed. Reg. 30096 *et seq.* (1976).

covered by the FEA's regulations at the time in question, 10 C.F.R. 211.182, and it concluded that petitioner had "adequate and fair notice" that solvents remained subject to the general price regulation as well.

Accordingly, there is nothing to the contention (Pet. 17, 21-22) that the court of appeals held petitioner was "bound to abide by regulations that the FEA should have issued but did not." To the contrary, after a review of the relevant provisions of both the EPAA and FEA's regulations, the court of appeals concluded that, despite some ambiguity engendered by FEA's amendment of its regulations, petitioner had adequate notice that the pricing regulation was applicable to solvents.[6] There is no reason for this Court to review that ruling. The regulation has long since been amended, solvents have been decontrolled (see note 5, *supra*), and the case thus presents no question of continuing significance.

2. Petitioner also urges (Pet. 19-21) that review is warranted because the holding that the FEA had a mandatory duty to regulate solvents under the EPAA conflicts with other decisions of the Temporary Emergency Court of Appeals.

The cases cited by petitioner do not conflict with the decision in the instant case. In *Consumers Union* v. *Sawhill*, 525 F. 2d 1068, 1077 (T.E.C.A. 1975) (en banc),

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[6]There is no merit to petitioner's argument (Pet. 23-24) that the court of appeals disregarded a finding of fact by the district court that petitioner did not know whether the FEA intended its regulations to apply to solvents. The district court commented (Pet. App. 26-a) that it did "not mean to attribute any degree of bad faith to [petitioner] for its interpretation of the April 5, 1974 regulation, and it would agree that '[petitioner] is not a seer nor can it devine [*sic*] the intent of the FEA underlying its own regulatory definitions.' " These general comments cannot fairly be characterized as a determination by the district court that the FEA's regulations were not adequate to give petitioner notice. But even if they could be so characterized, that determination would clearly be a ruling of law freely reviewable by the court of appeals.

the court began from the premise that "the Emergency Petroleum Allocation Act imposes upon FEA a mandatory duty to 'regulate' the price of new and released crude oil." It then concluded that although the FEA's pricing regulations allowed "new oil" to be sold at the market price, "the price of *all* crude oil [was] in fact regulated *within the meaning of the Act*" (525 F. 2d at 1078; emphasis in original). In *Mobil Oil Corp* v. *FEA*, 566 F. 2d 87, 103 (T.E.C.A. 1977), where the statutory language was ambiguous, the court upheld the FEA's conclusion that natural gas liquid products were refined petroleum products subject to regulation under the EPAA, noting the "strong indications from Congressional actions both before and after passage of the EPAA that Congress contemplated that these substances would fall within the ambit of agency authority." The court did not suggest that its holding was in any way inconsistent with the en banc court's conclusion in *Consumers Union* that the FEA had a duty to regulate crude oil. *Marathon Oil Co.* v. *FEA*, 547 F. 2d 1140 (T.E.C.A. 1976), cert. denied, 430 U.S. 983 (1977), is inapposite, since it concerned only the FEA's authority to regulate credit terms in its pricing regulations.

In any event, even if there were a conflict on this question within the Temporary Emergency Court of Appeals, the reconciliation of these internal differences would be a task for the Temporary Emergency Court and would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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